IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WILLIAM DAVID SAVAGE, Appellant.	No. 33291-4-II UNPUBLISHED OPINION

Hunt, J. – William David Savage appeals his convictions for second degree assault and third degree theft. He argues that (1) the charging document was inadequate in failing to allege the value of the stolen items, and (2) the evidence was insufficient to support his convictions. Holding that the value of the stolen items is not an element of third degree theft and the evidence was sufficient to prove both offenses, we affirm.

Facts

David Stockton owns a 10-acre parcel in Thurston County. He allowed William Savage to live in his van on the property and Dominick Feole to live in a motor home about 50 yards away from Savage.

I. Theft and Assault

On January 19, 2005, Feole came home to find that someone had tampered with his motor home door, breaking the bolts. Inside his trailer, he discovered that someone had taken his wallet, a cordless drill, a power converter, a sword, and a laptop computer.[1] After asking around about

the theft, Feole came to believe that Savage had done it.

According to Feole, when he confronted Savage with the theft allegation, Savage became very angry, said he was going to kill Feole, charged at Feole, knocking him to the ground, raised a bowling pin over his head, and screamed at Feole, "I'm going to crush your skull, I'm going to hit you, I'm going to kill you." Report of Proceeding (RP) at 29. Savage told Feole that the missing sword was his (Savage's) and that he was going to kill Feole with it. Feole feared for his life, ran away before Savage could get to him, and called 911.

Sergeant Clifford Ziesemer of the Thurston County Sheriff's Office responded. After talking with Feole, Ziesemer contacted Savage, who was in his van. Savage denied that he had had an altercation with Feole and that he had stolen Feole's property. When Savage offered to let Ziesemer look in his van, Ziesemer found Feole's wallet containing his ID under the mattress, and he observed a cordless drill on the seat.

When Ziesemer confronted Savage about Feole's wallet, Savage said he did not know how it had gotten into his van. Savage eventually admitted having taken the drill but said he did not have the sword. When Ziesemer asked him about the altercation with Feole, Savage admitted holding the bowling pin over his head and that he may have made some threatening comments to Feole. Later, at the Thurston County Jail, Savage again admitted taking the drill, taking Feole's wallet, and picking up the bowling pin in a threatening manner while saying threatening words to

[1] Feole also claimed that many other things had been taken: jewelry, a knife collection, electronic equipment, a CD player, his CD collection, paperwork (including his VW van title and marriage certificate), and his family photographs. At trial, however, the State did not attempt to prove that Savage had stolen these items.

Feole.

II. Procedure

The State charged Savage with second degree assault while armed with a deadly weapon,[2] first degree vehicle prowling,[3] third degree theft,[4] and intimidating a witness.[5]

At trial, Savage called James Stockert as a witness to Savage's altercation with Feole. Stockert testified that (1) he feared a fight might occur, approached Feole, and told him to leave; (2) Savage approached and was very angry; (3) when Feole made a derogatory comment;[6] Savage began running, picked up a bowling pin, and raised it over his head; (4) Stockert held Savage to keep him from hitting Feole; and (5) Feole ran off.

Savage testified that the altercation and thefts did not occur on the same day. Savage denied grabbing Feole and using life-threatening words. Savage testified that (1) he would have charged at Feole, but Stockert was holding him (Savage) back; (2) he (Savage) intended to scare Feole but not to hurt him physically; and (3) he (Savage) had taken the drill and power converter, claiming they were his property.

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[2] RCW 9A.36.021(1), RCW 9.94A.510, and RCW 9.94A.602.

[3] RCW 9A.52.095(1).

[4] RCW 9A.56.050.

[5] A violation of RCW 9A.72.110. The trial court severed this count, and the State later refiled it under a separate cause number.

[6] According to Savage's testimony, Feole had stolen a box of saw blades from him and sold them to Stockert. Feole's comment was that he did not care if Savage was mad and "[t]here ain't nothing that fat f**k can do about it." RP at 97.

The jury acquitted Savage of vehicle prowling and convicted him of second degree assault and third degree theft. By special verdict, the jury found that he had committed the assault with a deadly weapon.

Savage appeals.

ANALYSIS

I. Sufficiency of the Information

Savage first argues that we must reverse and dismiss his third degree theft conviction because the State failed to allege all the elements of the offense in the information. Specifically, he asserts that the State failed to allege that he committed theft of property or services not exceeding two hundred and fifty dollars in value. This argument fails.

A. Standard of Review

The Sixth Amendment to the United States Constitution and article I, section 22 (amend. 10) of the Washington Constitution require that a charging document include all essential elements of a crime, statutory and nonstatutory, so as to inform the defendant of the charges against him and to allow him to prepare his defense. *State v. Hopper*, 118 Wn.2d 151, 155, 822 P.2d 775 (1992); *State v. Kjorsvik*, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). An information that fails to state an offense on its face is unconstitutional and must be dismissed. *State v. Leach*, 113 Wn.2d 679, 686-87, 782 P.2d 552 (1989).

Our standard of review depends on when the defendant first challenges the sufficiency of the information. If he does so "at or before trial," we construe the information strictly. *State v.*

Vangerpen, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995). But if he does so after the verdict, we construe the information liberally, asking whether (1) the "necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" *Kjorsvik*, 117 Wn.2d at 105-06.

Here, Savage did not challenge the sufficiency of the information before the jury rendered its verdict. Thus, we construe the charging document liberally to determine whether it contains the essential elements of the charged crime and, if so, whether it prejudiced Savage's ability to prepare a defense.

B. Charging Language

The State charged Savage as follows:

> COUNT III: THEFT IN THE THIRD DEGREE. RCW 9A.56.050 - GROSS MISDEMEANOR:
>
> That the defendant, WILLIAM DAVID SAVAGE, in the State of Washington, on or about January 17-19, 2005, did take or wrongfully obtain personal property belonging to another with intent to deprive another of such property.

Clerk's Papers (CP) at 41. Savage argues that this information was defective because it fails to include the statutory element that the value of the property did not exceed $250. We disagree.

Savage is correct that RCW 9A.56.050 provides:

> (1) A person is guilty of theft in the third degree if he or she commits theft of property or services which (a) *does not exceed two hundred and fifty dollars in value* . . .

(Emphasis added.) But in *State v. Tinker*, 155 Wn.2d 219, 222-23, 118 P.3d 885 (2005), our

Supreme Court reviewed a pre-verdict challenge and held that value is not an essential element of a crime unless it represents a minimum threshold value that the State must prove:

> The plain language of the theft statutes compels the conclusion that value is not an essential element of third degree theft. The definition of value presumes that items for which a value cannot be ascertained have some value, albeit a value that does not exceed $250. Tinker has not challenged the value definition statute on any ground.
>
> Given that all items and services have presumed value, and thus there can be no defense that items were valueless, the third degree theft statute covers all items with a value less than $250. Value is an essential element of higher degree theft statutes because the statutes themselves have a *minimum* value threshold: $250 dollars for second degree theft (RCW 9A.56.040) and $1,500 dollars for first degree theft (RCW 9A.56.030). The possibility that stolen property had value less than these thresholds makes value an essential element of these crimes, since the "specification is necessary to establish the very illegality of the behavior." *Johnson*, 119 Wn.2d at 147.[7] Since all items have some value under the statutory definition of value, which Tinker has not challenged, there is no threshold specification necessary to establish the very illegality of the behavior. The act of taking any item constitutes at least third degree theft.

Tinker, 155 Wn.2d at 222. Because the State need not prove a minimum threshold value to prove third degree theft, *Tinker* defeats Savage's argument.

[7] *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992).

II. Sufficiency of the Evidence

Savage next challenges the sufficiency of the evidence supporting his second degree assault and third degree theft convictions. As to the assault, he claims that the State failed to show that he acted with intent to inflict bodily injury on Feole when Savage raised the bowling pin above his head and uttered threatening words. Savage contends that, according to his own testimony, he intended no physical harm to Feole and merely wanted Feole to leave him alone.

As to the theft, Savage claims that the State failed to show that he took Feole's property. Savage argues that, according to his own testimony, he owned the power drill and he took the power converter only after Stockert evicted Feole from the property.

A. Standard of Review

When facing a challenge to the sufficiency of the evidence, we ask whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Because credibility determinations are for the trier of fact and are not subject to review, *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

B. Assault

To prove that Savage committed second degree assault, the State had to prove that he

assaulted Feole with a deadly weapon in the State of Washington. Instruction 8.

Instruction 10 defined "assault" as being committed in three ways:

> An assault is an intentional touching or striking of another that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive, if the touching or striking would offend an ordinary person who is not unduly sensitive.
>
> An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it, and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.
>
> An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.
>
> An act is not an assault, if it is done with the consent of the person alleged to be assaulted.

CP at 126. Instruction 10 thus informed the jury that an assault could take place by way of a battery, an attempted battery, or intentional infliction of imminent fear of bodily injury.

The evidence was ample that Savage committed both the second and third types of assault as defined in Instruction 10. First, the evidence was undisputed that: (1) Savage angrily raised a bowling pin in a threatening way over his head, while threatening Feole with menacing words; and (2) Savage admitted that he did this because he wanted to frighten Feole. According to Feole, whose testimony the jury apparently believed, Savage grabbed him and pushed him to the ground. Stockert feared that Savage would reach Feole and told Feole to leave; but for Stockert's intervention, Savage could have reached Feole and completed a battery. Feole testified that he

feared for his life, that Savage repeatedly screamed he was going to kill him, and he (Feole) ran from the scene and called 911. This evidence supports an inference that Feole feared imminent bodily injury from Savage.

Taking the evidence in a light most favorable to the State, a jury could conclude beyond a reasonable doubt that Savage assaulted Feole.

C. Theft

Savage argues that the evidence does not support the jury's verdict that he committed theft because, according to his own testimony, the allegedly stolen property was his, not Feole's, and Feole had been evicted before Savage entered the motor home and took the property.

The trial court instructed the jury that, in order to convict Savage of theft, the State had to prove that (1) Savage "wrongfully obtained or exerted unauthorized control over property of services of another," (2) he "intended to deprive the other person of the property or services," and (3) "the acts occurred in the State of Washington." CP at 134, Instruction 18. The record shows that the State met this burden of proof.

Both Feole and Stockert testified that Savage did not have permission to enter the motor home, where Feole was living at the time. Feole testified that he owned the drill, the power converter, and his wallet, which Savage had denied stealing when Feole confronted him. Later, however, Savage admitted to Ziesemer that he had taken the drill, which was not his. The jury apparently did not belief Savage's claim that he did not know how Feole's wallet had come to be under the mattress in Savage's van. The jury could conclude from this testimony that Savage

wrongfully obtained the property from Feole. A jury could reasonably infer from this evidence that Savage intended to deprive Feole of the property.

Taking the evidence in a light most favorable to the State, a jury could conclude beyond a reasonable doubt that Savage committed theft of Feole's property.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Armstrong, J.

Van Deren, A.C.J.